

1                                   **UNITED STATES DISTRICT COURT**  
2                                   **DISTRICT OF NEVADA**

3   THE ASTOUND GROUP,

4                   Plaintiff

5   v.

6   FARADAY FUTURE, a California  
7   corporation,

8                   Defendants

Case No.: 2:18-cv-00975-APG-CWH

**Order Granting Motion to Dismiss**

[ECF No. 12]

9           Defendant Faraday & Future Inc. (incorrectly named in the complaint) moves to dismiss  
10 the breach of the implied covenant and promissory estoppel claims asserted by plaintiff The  
11 Astound Group. Faraday contends these claims are duplicative of Astound's breach of contract  
12 claim. It also argues that the promissory estoppel claim is not pleaded with the specificity  
13 required by Federal Rule of Civil Procedure 9(b). I grant the motion to dismiss but allow  
14 Astound leave to amend.

15           **Breach of the Implied Covenant**

16           Astound contends that it can simultaneously assert both breach of contract and breach of  
17 the implied covenant. A claim of breach of the implied covenant arises "[w]hen one party  
18 performs a contract in a manner that is unfaithful to the purpose of the contract and the justified  
19 expectations of the other party are thus denied. . . ." *Hilton Hotels Corp. v. Butch Lewis*  
20 *Productions, Inc.*, 808 P.2d 919, 923 (Nev. 1991). Faraday argues the claim is inconsistent with  
21 a breach of contract claim because the breach of the implied covenant claim requires a showing  
22 of "literal compliance" with the contract. But it points to no cases holding that the breaching  
23 party must comply with the entire contract. As Astound notes, in theory a party could be liable

1 for breaching one part of the contract, and also breach the implied covenant by other actions that  
2 are “unfaithful to the purpose of” a different part of the contract. ECF No. 14 at 11. Thus, both  
3 claims can be pleaded simultaneously. However, Astound’s complaint does not clearly plead  
4 separate facts giving rise to separate claims of breach of contract and breach of the implied  
5 covenant.

6 Astound also argues that its breach of the implied covenant claim is pleaded as an  
7 alternative “failsafe in the event that the Court finds that there was no breach of the Contract.”  
8 ECF No. 14 at 11. While pleading in the alternative is permitted by Federal Rule of Civil  
9 Procedure 8(d), all of Astound’s allegations are incorporated into each cause of action, without  
10 designating them as alternative claims. *See Maloney v Scottsdale Ins. Co.*, 256 Fed. Appx. 29,  
11 31-32 (9th Cir. 2007) (holding that inconsistent allegations “were not pleaded in the alternative  
12 [because] they were expressly incorporated into each cause of action”). Thus, as pleaded, these  
13 are not alternative claims.

14 I dismiss the breach of the implied covenant claim. But Astound may be able to cure  
15 these pleading defects, so I grant it leave to amend. It should designate whether the claims are  
16 separate, alternative, or both.

17 **Promissory estoppel.**

18 Faraday argues that Nevada law does not recognize a claim for promissory estoppel.  
19 Astound points out that the Supreme Court of Nevada has recognized promissory estoppel in at  
20 least two cases. In *Torres v. Nev. Direct Ins. Co.*, 353 P.3d 1203, 1209 (Nev. 2015) the court  
21 referred to promissory estoppel as a “theory.” In *Pink v. Busch*, 691 P.2d 456, 459-60 (Nev.  
22 1984), the court stated that “[p]romissory estoppel . . . can be used as a ‘consideration substitute’  
23

1 to support the release of liability under a guaranty contract.” The court has thus not been clear  
2 whether promissory estoppel is a stand-alone claim or part of another claim.

3 At this stage, I need not decide whether promissory estoppel is a stand-alone claim under  
4 Nevada law. Astound’s complaint puts Faraday on notice that it is pursuing promissory estoppel  
5 as a way to recover its alleged damages. I leave for another day whether Astound can prevail on  
6 it as an independent claim or whether it must be proven as a substitute element of another claim.

7 Faraday next contends that promissory estoppel is subject to the heightened pleading  
8 standard of Federal Rule of Civil Procedure 9(b). I need not decide whether Rule 9(b) applies in  
9 all cases where promissory estoppel is pleaded<sup>1</sup> because Astound does not dispute its  
10 applicability here. Astound’s complaint includes specifics about some representations by  
11 Faraday manager O’Neill. ECF No. 1 at ¶¶ 9, 18. But many other allegations are vague and do  
12 not satisfy Rule 9(b). *See, e.g., Id.* at ¶ 10 (“verbal confirmation and reinforcement . . . from all  
13 employees and directors at Faraday”), ¶ 14 (referring to “representations” but not identifying the  
14 substance or speakers), ¶ 46 (alleging “Faraday was misrepresenting its intentions” but not  
15 identifying the substance or speakers). Although Astound need not allege the details of every  
16 communication that gives rise to its claim, here Faraday is left to guess about who said what that  
17 caused Astound to believe it was hired and would be paid for its work.

18 I dismiss the promissory estoppel claim. But the defects in the complaint can be cured so  
19 I grant Astound leave to file an amended complaint. Again, Astound should designate whether  
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22 <sup>1</sup> Astound calls the statements giving rise to its promissory estoppel claim “knowingly false  
23 promises. . . .” ECF No. 14 at 15:14. As such, Rule 9(b) would apply. But promissory estoppel  
might arise even absent a knowingly false representation. *See Pink*, 691 P.2d at 459-60 (listing  
elements of promissory estoppel but not including intentional misrepresentation).

1 its promissory estoppel claim is separate, alternative, or both with regard to the breach of  
2 contract claim.

3 IT IS THEREFORE ORDERED that the motion to dismiss (**ECF No. 12**) is **granted**.

4 Astound may file an amended complaint by April 19, 2019. If it does not, the case will proceed  
5 on the remaining claims.

6 DATED this 28th day of March, 2019.



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ANDREW P. GORDON  
UNITED STATES DISTRICT JUDGE